

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
DELTA DIVISION

JAMES C. DIAL, SR.

PLAINTIFF

VS.

CIVIL ACTION NO. 2:95CV38-D-B

THE HARTFORD ACCIDENT  
& INDEMNITY CO.

DEFENDANT

**MEMORANDUM OPINION**

This cause comes before the court upon the defendant's Motion for Summary Judgment. The plaintiff, James C. Dial, Sr., has sued The Hartford Accident & Indemnity Company ("Hartford") alleging that the defendant breached its duty of good faith and fair dealing by refusing to honor Dial's workers' compensation claims arising from an isolated incident of exposure to welding fumes. Hartford contends in its Motion for Summary Judgment that the Mississippi Workers' Compensation Commission ("Commission") already determined that Hartford was not contractually obligated for those claims and that the Commission's adjudication bars this suit for punitive and exemplary damages. In the alternative, Hartford submits that it had an arguable reason for denying Dial's claims which also precludes any exemplary award. After a thorough review of the record in this cause, the undersigned finds that the defendant's motion for summary judgment is not well taken and it shall be denied.

### FACTUAL BACKGROUND<sup>1</sup>

Bolivar County Gravel ("BCG") employed James Dial as a towboat pilot and dredge operator for approximately ten (10) years prior to November 24, 1986.<sup>2</sup> United States Fidelity & Guaranty Company ("USF&G") wrote BCG's workers' compensation coverage for the first eight and a half of those ten years. However, from May 14, 1985, through November 24, 1986, Hartford insured BCG for workers' compensation payments including reimbursement of medical bills and travel expenses.

Dial suffered an employment-related disability on or about November 24, 1986, when he inhaled some poisonous fumes while welding. This disability, which plagues him to this day, eventually required Dial to leave his job on September 11, 1987, and he has not been employed since that time.

After Dial inhaled the fumes, he continued to work that day and the next thirty days without lost time. On December 20, 1986, Dial went to the Bolivar County Hospital emergency room complaining of breathing difficulties and weakness. Following that visit, he

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<sup>1</sup>In a motion for summary judgment, the facts must be construed in the light most favorable to the non-moving party. Matagorda County v. Russel Law, 19 F.3d 215, 217 (5th Cir. 1994). The court's recitation of the facts in this case reflects this rule.

<sup>2</sup>Prior to that employment, Dial had worked various other jobs for BCG's predecessors which also exposed him to welding fumes and smoke for approximately twenty (20) years. See Bolivar County Gravel Co. v. Dial, 634 So. 2d 99 (Miss. 1994), for a thorough review of the facts of this case.

did not return to work until February 2, 1987. Dial requested workers' compensation benefits during that time, claiming a job-related injury due to the November 24, 1986, incident. Hartford refused to pay until Dial underwent an independent examination by a pulmonary specialist, Barry L. Whites, M.D., in Jackson, Mississippi. After receiving the results of that examination,<sup>3</sup> Hartford paid Dial's medical expenses and all compensation benefits owed him up to February 2, 1987.

Dial resumed his job on February 2, 1987, and worked without lost time through September 12, 1987, at which time his breathing difficulties aggravated and he became unable to return to work. He has been unemployed since that time and Hartford does not dispute his claim of total disability as of that September date.

Subsequently, Dial filed a workers' compensation claim seeking permanent disability benefits from Hartford for the November 24, 1986, incident which he alleged left him permanently and totally disabled. Because of Dial's preexisting lung difficulties,<sup>4</sup> Hartford initially refused to pay until the receipt of supplemental medical information. Dial later amended his claim to add USF&G as

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<sup>3</sup>Dr. Whites concluded at that time, based in part upon the limited information Dial's doctor had provided, that the welding fumes Dial inhaled on November 24, 1986, probably contributed to Dial's lung problems.

<sup>4</sup>Dial had been hospitalized for lung problems in 1980 and suffered a collapsed lung in May, 1983. He also was a heavy cigarette smoker until he quit in 1982, smoking up to two packs a day for 25 to 28 years. Dial, 634 So. 2d at 101.

a party and include an alternative cause of action for "repetitive exposures" with BCG dating from 1977 through November 23, 1986. USF&G and BCG both settled with Dial who discharged them under the Mississippi Workers' Compensation Act for any lung impairment resulting from his exposures prior to May 1985, the inception date of Hartford's coverage. That left only Hartford in the case with two causation issues as to his permanent disability: (1) the causal effect of Dial's inhalation of noxious agents on November 24, 1986; and (2) the causal effect of Dial's repetitive exposures from May 1985 through November 23, 1986, the period Hartford insured BCG.

The Administrative Law Judge (ALJ) rejected the isolated incident of November 24, 1986, as having any causal relationship with Dial's permanent lung disability.<sup>5</sup> The ALJ did award benefits, however, based on the repetitive exposure theory. Both Dial and Hartford appealed that decision to the Commission which affirmed the ALJ except for reducing the final disability award by 90% after finding that 90% of Dial's lung damage was due to a pre-

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<sup>5</sup>The ALJ found that Dial was temporarily totally disabled for a period beginning December 20, 1986, and ending February 2, 1987 due to his exposure on November 24, 1986. ALJ's Order, at 12, attached as Defendant's Exhibit 5H. However, the ALJ further found that Dial suffered no lasting impairment from that temporary disability. Id. at 2 ("Medical testimony herein compels the conclusion that claimant fully recovered from the episode of November 24, 1986, on or about February 2, 1987."); Dial, 634 So. 2d at 100.

existing lung disease for which Hartford was not liable.<sup>6</sup> This decision was ultimately affirmed by the Mississippi Supreme Court. Bolivar County Gravel Co. v. Dial, 634 So. 2d 99 (Miss. 1994). Hartford then promptly paid Dial's lung-related medical expenses and all disability benefits to which he was entitled due to the 10% award.

Subsequently, Dial sued Hartford in state court alleging that Hartford breached its duty of good faith and fair dealing by refusing to promptly pay submitted claims. Hartford removed the case to this court and filed its Motion for Summary Judgment presently under consideration.

#### **SUMMARY JUDGMENT STANDARD**

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled

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<sup>6</sup>Although Dial did appeal the Commission's reduction of his award based on repetitive exposure, Hartford asserts that Dial did not appeal any further the Commission's rejection of Dial's claim for permanent disability benefits on account of the isolated November exposure. Defendant's Brief, at 2. Dial does not dispute this statement in his brief. Without further record evidence on this matter, Dial is bound to that holding due to the relevant statutory language.

The final award of the commission shall be conclusive and binding unless either party to the controversy shall, within thirty (30) days from the date of its filing in the office of the commission and notification to the parties, appeal therefrom to the circuit court of the county in which the injury occurred.  
Miss. Code Ann. § 71-3-51.

to a judgment as a matter of law." F.R.C.P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Once a properly supported motion for summary judgment is presented, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); Brothers v. Klevenhagen, 28 F.3d 452, 455 (5th Cir. 1994). "Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); Federal Sav. & Loan Ins. v. Krajl, 968 F.2d 500, 503 (5th Cir. 1992). The facts are reviewed drawing all reasonable inferences in favor of the party opposing the motion. Mataqorda County v. Russel Law, 19 F.3d 215, 217 (5th Cir. 1994).

#### **DISCUSSION**

In resolving matters of substantive law in diversity cases such as this, the court is Erie-bound to apply Mississippi law. Erie RR v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed.2d 1188 (1938); Eichenseer v. Reserve Life Ins. Co., 682 F. Supp. 1355, 1361 (N.D. Miss. 1988). Hartford submits that summary judgment is

appropriate because (1) Dial was not awarded contractual damages grounded on the November 24, 1986, incident, and (2) Hartford has demonstrated the absence of any genuine issue of material fact and it is entitled to judgment as a matter of law.

#### A. Award Of Contractual Damages

Dial has brought a bad faith action based solely on his single exposure to welding fumes on November 24, 1986. See Plaintiff's Complaint, ¶ IV. "[A] 'prerequisite to the award of punitive damages [under such an action] is the determination that the plaintiff is entitled to contractual damages.'" Dial v. Hartford Accident & Indemnity Co., 863 F.2d 15, 16 (5th Cir. 1989) (quoting McCain v. Northwestern Nat'l Ins. Co., 484 So. 2d 1001, 1002 (Miss. 1986)). Hartford asserts that the ALJ and the Commission declined to award Dial disability benefits due to the isolated exposure. This asseveration is partially correct. The ALJ found that Dial fully recovered from the November incident and rejected Dial's claim for permanent disability benefits grounded on that single exposure. However, the ALJ did hold Hartford liable for temporary total disability benefits from December 20, 1986, through February 2, 1987, due to Dial's exposure in November. ALJ Order, at 15, attached as Defendant's Exhibit 5H.

The wording of Dial's Complaint could lead to some confusion on this issue. It states that:

[O]n or about November 24, 1986, the Plaintiff seriously injured his lungs which has caused Plaintiff serious permanent

and total disability, which disability has continued to the present time.

Plaintiff's Complaint, ¶ IV (emphasis added). However, as noted earlier, the ALJ, whose decision the Commission later affirmed, found that Dial fully recovered from that single exposure by February 2, 1987, and that Dial's permanent disability was not a result of that incident, but resulted from repetitive exposures. Therefore, Hartford was not held contractually liable for Dial's permanent disability claim grounded on the isolated November incident and cannot be liable for a bad faith action grounded on such a claim. Shepherd v. Boston Old Colony Ins. Co., 811 F. Supp. 225, 230-31 (S.D. Miss. 1992) ("A further feature of Mississippi law is the well-settled principle that a worker may not bring a bad faith claim against the insurer unless first a determination has been made that the worker was entitled to the benefits at issue in the underlying workers' compensation action.") (citing cases); see also Dial, 863 F.2d at 16 ("A claim of entitlement to worker's compensation benefits is a matter within the exclusive original jurisdiction of the . . . Commission."); Miss. Code Ann. § 71-3-47.

However, the Complaint can be read to embrace a claim for bad faith refusal to pay benefits due for temporary disability caused by the isolated event. It further states:

The Hartford Accident and Indemnity Company has breached its duty of fair dealing and good faith owed to Plaintiff in the following respects:

(a). failing to pay medical and drug bills at a time when the Defendant knew Plaintiff was totally disabled and entitled



to said benefits under said insurance policy.

Plaintiff's Complaint, ¶ VI. By not limiting his claim to benefits due because of permanent disability, Dial's Complaint can be read to include a bad faith claim for failure to pay temporary disability benefits due as a result of the November incident. See Information Resources, Inc. v. United States, 950 F.2d 1122, 1127-28 (5th Cir. 1992) (noting that complaint need only assert facts sufficient to give defendant notice), superseded on other grounds, Venen v. United States, 38 F.3d 100 (5th Cir. 1994). As those benefits were awarded in the ALJ's Order, Dial's bad faith claim grounded on Hartford's delay in paying temporary benefits and medical bills is not barred by the prerequisite that contractual liability attach before such a claim may be brought.

#### B. Elements of Bad Faith

In the alternative, Hartford submits that Mississippi law precludes any award of exemplary damages to Dial because Hartford had an arguable reason for denying Dial's claims.

Under Mississippi law in order to recover punitive damages for an insurer's bad faith refusal to pay a claim, the plaintiff must prove two things: (1) that the insurer had no legitimate or arguable reason to deny payment on the claim, and (2) that the insurer acted with gross and reckless disregard for the insured's rights so that it becomes a heightened tort.

Prudential Property & Casualty Ins. Co. v. Mohrman, 828 F. Supp. 432, 440 (S.D. Miss. 1993) (emphasis added). The Mississippi Supreme Court defines an "arguable reason" as

one in support of which there is some credible evidence. There may well be evidence to the contrary. A person is said to have an arguable reason for acting if there is some credible evidence that supports the conclusions on the basis of which he acts.

Id. (quoting Blue Cross & Blue Shield, Inc. v. Campbell, 466 So. 2d 833, 851 (Miss. 1984)). However, the lack of an arguable reason alone does not lead inevitably to an imposition of punitive damages. Not only must the plaintiff demonstrate the absence of an arguable reason, but he must also show "some wilful or malicious wrong or the gross or reckless disregard for the rights of others." Id. (quoting Eichenseer v. Reserve Life Ins. Co., 682 F. Supp. 1355, 1363 (N.D. Miss. 1988)).

#### 1. An Arguable Reason

Hartford asserts that Dial must necessarily lose on the first prong -- lack of an arguable reason. As previously noted, Dial had been a heavy smoker for approximately 25 to 28 years prior to November 24, 1986. He also had a history of lung-related difficulties. On the day in question, Dial had been welding out in the open and not in an enclosed space where welding fumes could have accumulated. Furthermore, Dial continued to work the rest of the day in question and for the following thirty (30) days with no lost time. Because of these circumstances surrounding Dial's claim for temporary total disability benefits, Hartford submits it had

more than an arguable reason to delay payment.<sup>7</sup>

Hartford turned Dial's file over to a claims adjustor in January and refused payment until an independent doctor could evaluate Dial's condition. Such an examination did not occur until April 15, 1987, when a pulmonary specialist, Dr. Barry Whites, in Jackson, Mississippi, conducted an interview with Dial. After his examination, Dr. Whites tendered to Hartford his opinion that the November 24, 1986, exposure probably contributed to Dial's lung problems necessitating his leave from work December 1986 through February 1987. Whites Depo., Apr. 6, 1988, attached as Defendant's Exhibit 5G, at 29-30. On May 20, 1987, Hartford remitted to Dial all payments due him for his period of temporary total disability. Atkinson Aff., Oct. 5, 1995, at 5.

Dial submits that Hartford did not have an arguable reason to delay payment of his claim because Hartford had no opinion from any doctor contradicting Dial's doctor, Dr. A.W. Lindsey, who had examined Dial and determined that the November exposure caused Dial's temporary total disability. Although the facts appear to favor Hartford, the undersigned cannot say as a matter of law that

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<sup>7</sup>Hartford further submits that when it was first notified of Dial's disability, the notice merely stated Dial was expected to be absent from work only three (3) days. Workers' compensation benefits are not required until five (5) consecutive days are missed. Miss. Code Ann. § 71-3-11. Hartford contends it was unaware of the length of Dial's leave until late January. At that time, Hartford turned the file over to a claims adjustor. Atkinson Aff., Oct. 5, 1995, at 2.

Hartford had an arguable reason for delaying action on Dial's claim. However, this conclusion alone does not inevitably lead to a denial of Hartford's summary judgment motion since the court must also address the second prong of the bad faith claim.

## 2. Heightened Tort

The gravamen of Dial's argument for maliciousness or wilfulness on Hartford's part is the amount of time that elapsed between when Dial first submitted his claim for temporary total disability payments in December and the time when Hartford complied with his request in May of the following year. This delay of approximately five (5) months is part of what Dial alleges constitutes bad faith on the part of Hartford. Hartford offers a detailed explanation of its actions during those five months as it continued to evaluate Dial's claim. Atkinson Aff., Oct. 5, 1995, at 2-5. However, the court is again unable to say as a matter of law that such a delay was not in gross disregard of Dial's rights.

Dial also offers record evidence that Hartford instructed the Bolivar Insurance Agency, Hartford's local insurance representative, to refrain from forwarding to Hartford any more of Dial's bills related to the November incident. Plaintiff's Exhibit 1. Certainly such evidence, in addition to the five-month delay in payment, precludes an award of summary judgment in Hartford's favor.

## CONCLUSION

Hartford was held contractually liable under the Workers' Compensation Act for compensation due Dial for his temporary total disability arising from his exposure to welding fumes on November 24, 1986. Therefore, Dial has demonstrated the prerequisite of contractual liability for this bad faith claim, precluding an award of summary judgment on that ground. Furthermore, based on the record, the court cannot hold as a matter of law that Hartford had an arguable reason for delaying payment of those benefits approximately five (5) months, or that Hartford did not act in reckless disregard of Dial's rights in this matter. Based on the foregoing, the court is of the opinion that Hartford's motion for summary judgment is not well taken and it shall be denied.

A separate order in accordance with this opinion shall issue this day.

THIS \_\_\_\_\_ day of January, 1996.

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United States District Judge

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DEFENDANT

**ORDER DENYING SUMMARY JUDGMENT**

Pursuant to a memorandum opinion entered this day, the court upon due consideration of defendant's motion for summary judgment, finds the said motion not well taken and the same will be denied.

It is therefore ORDERED that:

1) defendant's motion for summary judgment be, and it is hereby, DENIED.

All memoranda, depositions, affidavits and other matters considered by the court in denying the defendant's motion for summary judgment are hereby incorporated and made a part of the record in this cause.

SO ORDERED, this \_\_\_\_ day of January, 1996.

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United States District Judge